in his own name was known by defendant to have been acting as agent for plaintiff. Demurrer sustained by lower court. Held complaint should have been sustained as stating a cause of action. *Lagumis* v. *Gerard* (1921) 190 N. Y. S. 207.

Will the court of appeals sustain this revolutionary, but very sensible, decision of the supreme court? Judge Cropsey, on the strength of *Harris* v. *Shorall,* 230 N. Y. 343 (1921), thinks it will. Pound, J. there said: "When so much of the old value and high nature of the seal has been lost, the court should not be tenacious to preserve one of its minor incidents for the sake of the rule, but should rather strive to give to the real agreement of the parties." He notes, however, that there may be some reluctance to vary an established rule, and is perhaps relieved that the instant case can be decided on other grounds, leaving this point for final decision when a case is presented compelling a decision. *Lagumis* v. *Gerard* is not the only New York case allowing an action by an undisclosed principal on a contract under seal, but on which a seal was unnecessary. See *e. g. Campbell* v. *Poland Spring Co.,* 187 N. Y. S. 643 (1921). But the court of appeals as late as *Case* v. *Case,* 203 N. Y. 263 (1911) held that "nothing is more definitely settled in our law than that an instrument under seal cannot be enforced by or against one who is not a party to it. This is so elementary as to be axiomatic." This case has been cited at least nine times by New York inferior courts, though often to make distinctions taking the case out of the rule. See *Staff* v. *Bemis Realty Co.,* 183 N. Y. S. 886; *O'Grady* v. *Howe Company,* 152 N. Y. S. 79; *Lockwood* v. *Smith,* 143 N. Y. S. 480.

The instant case, however, is the first in New York to take the rule as to sealed instruments by the collar and pitch it out of court as "an arbitrary, unreasonable rule, which never accomplishes any good, and is used only to prevent the administration of justice." In some other jurisdictions courts have accomplished as much without saying so with such brutal frankness. *Woolsey* v. *Henke,* 125 Wis. 134.

APPEAL AND ERROR—COMPETENT EVIDENCE EXCLUDED—ERROR PRESUMED PREJUDICIAL.—The appellant in a civil suit assigned as error the exclusion of competent, material evidence offered by him. *Held,* case must be reversed, for error is presumed prejudicial unless from the record it appears that the error has worked no prejudice to the objecting party. *Borough* v. *Minneapolis & St. L. Ry. Co.,* (Ia. 1921) 184 N. W. 320.

To secure a reversal in the early common law because of error in the exclusion of competent evidence, the appellant had to show that its admission would probably have resulted in a judgment in his favor. *Tyrwhitt* v. *Wynne,* (1819) 2 Barn. & Ald. 554, and where incompetent evidence was admitted, the court refused a new trial when there was sufficient evidence, without that erroneously admitted, to warrant the finding of the jury. *Doe* v. *Tyler,* (1830) 6 Bing. 561, but the court rejected these salutary rules in *Crease* v. *Barrett,* (1835) 1 Crompton M. & R. 918, because of a fear that the courts would assume the duties of the jury and that a careless treatment

of the rules of evidence would result. According to Mr. Wigmore this case "announced a rule which in spirit and later interpretation signified that an error of ruling created *per se* for the excepting and defeated party a right to a new trial." 1 WIGMORE ON EVIDENCE § 21. This rule was changed in England by the Judicature Act, 1875, Rules of Court, Order 39, rule 3, which provides: "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; * * *" The courts in the United States quite universally followed the regrettable "heresy that error in a ruling on evidence is presumed prejudicial. *Ellis* v. *Short*, 21 Pick. (Mass.) 142; *Bolton* v. *Cuthbert*, 132 Ala. 403; *Callaway & Truitt* v. *Gay*, 143 Ala. 524; *St. Louis, I. M. & S. Ry. Co.* v. *Steed*, 105 Ark. 205. And some courts with common law tenacity still cling to the rule notwithstanding statutes requiring them to disregard all errors not affecting the substantial rights of the adverse party. See *Hatch* v. *Bayless*, 164 Mo. App. 216; *Reed* v. *Reed*, 101 Mo. App. 176; and Missouri, R. S. 1899, Sect. 865. Also, *Indiana Union Traction Co.* v. *Hiatt, Admr.*, 65 Ind. App. 233; and Indiana, R. S. 1881, Sect. 1891. The same is true of the principal case. See Iowa, Compiled Code, 1919, Sect. 7244. Some statutes, with more specific provisions, seem to insure against such practice, e. g. Michigan, Compiled Laws 1915, § 13763 provides: "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." The rule in this form is approved and recommended for both civil and criminal cases by the American Bar Association. Reports of American Bar Association, 1908, p. 542. The federal courts also held that error on a ruling was presumed prejudicial. *National Biscuit Co.* v. *Nolan*, 138 Fed. 6; *Inman Bros.* v. *Dudley & Daniels Lumber Co.*, 146 Fed. 449. But in *Press Pub. Co.* v. *Monteith*, 180 Fed. 356, the court said, "The defendant * * * invokes the *archaic* rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights. Prejudice must be perceived, not presumed or imagined." *Accord: Miller* v. *Continental Shipbuilding Corporation*, 265 Fed. 158, where incompetent evidence was admitted. Under the compulsion of statutes, many state courts have adopted this sensible rule. *Byers* v. *Territory*, 1 Okla. Crim. Rep. 698; *Cox* v. *Chase*, 99 Kan. 740; *Koepp* v. *National Enameling and Stamping Co.*, 151 Wis. 302. It has been incorporated into the court rules by some courts. Alabama, Supreme Court Rules, Rule 45, 175 Ala. xxi; Mississippi, Supreme Court Rules, Rule 11, 101 Miss. 906. For an interesting case, see *Jones* v. *State*, 104 Miss. 871, and note, L. R. A. 1918 B 388.